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No. 1003

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
MARVIN E. FRANKEL,
Special Assistant to the Attorney General,
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys,
Department of Justice,
Washington 25, D.C.

CHESTER W. WILSON,
Lieutenant Colonel, USAF,
Office of the Judge Advocate General,
United States Air Force,
Washington 25, D.C.

or in any other place when the events giving rise to the case occur in that place. This case—where the offense was against military law and was committed while Toth was a member of the military forces subject to that law—arose in the military forces. Toth's discharge before the crime was prosecuted makes no difference. In holding for over ninety years that this is so, Congress and the lower courts have conformed to the plain meaning of the Fifth Amendment.

II

A. Clearly intending in Article 3(a) of the Uniform Code to reach cases just like this one, Congress did not legislate in what petitioner describes (Br. 42) as "a confounding or abortive manner" by failing to provide the procedures to implement this objective. The Code provides in express terms for apprehending and holding for trial persons like Toth. Article 7(b) governs the apprehension of both persons "subject to this code" and those "subject * * * to trial thereunder." The latter phrase squarely covers Toth. Similarly, Article 9(c) authorizes restraint of "a civilian subject to * * * trial" under the Code on order of "a commanding officer to whose authority he is subject." Referring explicitly to a civilian like Toth, the provision is not to be nullified by petitioner's suggestion that, because he was a civilian, there was no "commanding officer to whose authority he [was] subject." Naturally, the Code does not specify the commanding officer to whose authority Toth would be sub-

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ject any more than it describes the commanding officer of a deserter from a unit subsequently inactivated or the commander of an army in the field. This is a matter for appropriate orders and regulations. The Articles of the Code subject Toth to *military authority*, and there is no question that, beginning with the directive of the Secretary of the Air Force, Toth's restraint was effected by commanding officers to whose authority he had been duly made subject.

B. Toth's apprehension by military authorities and removal for trial to Korea, where the offense occurred, accords with due process. As this litigation demonstrates, the civil courts were open to him to test on habeas corpus the assertion of military jurisdiction, *Billings* v. *Truesdell*, 321 U.S. 542; *Burns* v. *Wilson*, 346 U.S. 137. Subject to this safeguard, there is no constitutional infirmity in the exercise of military jurisdiction by military authorities following the fair procedures prescribed by military law.

"The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge." *Hughes* v. *Gault*, 271 U.S. 142, 149 (Holmes, J.). And there is nothing strange to American tradition in providing, as Congress has since at least 1863 (cf. *Martin* v. *Mott*, 12 Wheat. 19, decided in 1827), that military officers may apprehend and bring before military courts persons subject to trial in such courts. This action was taken against Toth only

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OCTOBER TERM, 1954

No. 150

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH, PETITIONER

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 37-50) is reported at 215 F. 2d 22. The opinions of the District Court (R. 21-23 and 30-33) are reported at 113 F. Supp. 330 and 114 F. Supp. 468.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1954 (R. 51). The petition for

a writ of certiorari was filed on June 18, 1954, and was granted on October 14, 1954 (R. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress has empowered the military authorities to apprehend and try by court-martial a person discharged from the armed forces who is subject to trial under Article 3(a) of the Uniform Code of Military Justice for an offense committed while in the armed forces which is punishable by confinement of five years (or more) and is not triable by a civil court of the United States.

2. Whether Article 3(a) of the Uniform Code, providing for trial by court-martial of such offenders, is constitutional.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, set forth in the Appendix, *infra*, pp. 59-67, are as follows: Uniform Code of Military Justice, 64 Stat. 107-145 (50 U.S.C. 551-736), Articles 3, 5, 7, 9, 32, and 34; and Manual for Courts-Martial, United States, 1951 (16 F.R. 1303-1469), paragraphs 11, 19; and Federal Rules of Criminal Procedure, Rule 40.

STATEMENT

Robert W. Toth was honorably discharged from the United States Air Force on December 8, 1952, after service in Korea (R. 1-2, 8).

On April 8, 1953, an officer of the United States Air Force, Far East Air Logistic Force, an overseas command, signed court-martial charges under

oath charging Toth with the premeditated murder in Korea of a Korean national on or about September 27, 1952, and with conspiracy to commit murder in Korea on or about September 27, 1952, all in violation of the Uniform Code of Military Justice (R. 8, 15-18).

On April 30, 1953, the Acting Secretary of the Air Force, upon consideration of the report of investigation theretofore conducted and the sworn court-martial charges, consented to the apprehension, return to Korea, and trial by court-martial of Toth, and directed the Air Provost Marshal, Air Force, to effect the apprehension of Toth and cause him to be delivered forthwith to the Commanding General, Fifth Air Force, an overseas command of the Air Force (R. 19-20).[1] On May 13, 1953, at Pittsburgh, Pennsylvania, Toth was apprehended by military personnel of the Air Force and subsequently transferred to Korea (R. 63, 66, 69, 74).

On May 27, 1953, Toth's sister, the petitioner here, filed in the District Court for the District of Columbia a petition for a writ of habeas corpus, directed to the Secretary of the Air Force, seeking Toth's release from the custody of the Air Force on the ground that his apprehension and removal to Korea were in violation of the Constitution and

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[1] Paragraph 11b of the Manual for Courts-Martial, 1951, 16 F.R. 1308, provides that jurisdiction under Article 3(a) of the Code, for offenses committed while in service triable by court-martial after discharge, "should not be exercised without the consent of the Secretary of the Department concerned." Appendix, *infra*, pp. 62-63.

the Rules of Criminal Procedure (R. 1-6). The District Court issued an order to show cause (R. 7). Respondent filed a return (R. 7-20) and several affidavits as to the circumstances leading to the charges and the manner of Toth's apprehension (R. 54-74, 78-83).

The affidavits show that, on March 11, 1953, prior to the preferment of charges, Toth voluntarily accompanied an agent of the Office of Special Investigations of the United States Air Force to the agent's Pittsburgh Detachment Office (R. 54-55, 57). The agent read and explained to Toth his right under Article 31(b) of the Uniform Code of Military Justice (50 U.S.C. 602) not to make any statement concerning the offenses being investigated, and advised him that any statement made by him could be used as evidence against him in a trial by court-martial. Toth was also informed of the nature of the matter being investigated. Toth stated that he had knowledge of the matter under investigation but refused to answer any other questions on grounds of self-incrimination. He further stated that the incident had occurred while he was in the military service and that, since he was a civilian, he did not wish to revive it.

At the time of arrest the officer in charge of the apprehending party read to Toth the charges, the specifications, and the Acting Secretary's letter consenting to his apprehension, and advised him again of his rights under Article 31(b) of the Uniform Code (R. 80). Toth was then taken to the Air Provost Marshal's Office at the Greater Pittsburgh

Airport, where again the charges, specifications and the Acting Secretary's letter were read to him, and he was again advised of his rights under Article 31(b) (R. 81). Toth was informed that he could telephone his parents and call a civilian lawyer if he so desired before leaving Pittsburgh. (R. 64, 70.) He stated that he did not desire to contact a lawyer but would wait and have defense counsel appointed for him in Korea (R. 70). In a telephone conversation with his stepfather he stated that he did not want the press to have any knowledge of what happened (R. 81, 82). On the same day, May 13, 1953, Toth was flown from Pittsburgh to Andrews Air Force Base, Maryland (R. 64, 81). There he was informed that he could contact the staff judge advocate or the chaplain, or both, if he so desired (R. 82). He was given permission to write letters (R. 65, 67, 70, 71, 73, 82). On May 15, 1953, he was flown to Travis Air Force Base, California, and from there to Korea, where he arrived on May 18, 1953 (R. 72-74).

A civilian attorney of Pittsburgh was retained by Toth's family to represent him. The Air Force facilitated the departure of this civilian attorney for Tokyo and made possible his transportation from Tokyo to Korea. Two qualified military counsel were assigned to represent Toth during the pretrial investigation under Article 32 of the Uniform Code. His civilian attorney was advised that, in the event Toth desired military counsel other than those theretofore appointed, Toth could make request therefor as provided in the 1951 Manual for

Courts-Martial. Toth's civilian attorney was also advised that, in the event he represented Toth in the trial, the appointed defense counsel and assistant defense counsel would be available to act as associate counsel if Toth so desired. (R. 38, 93.)

After hearing argument, the District Court ordered that the writ issue (R. 21-23). An appeal from that order was dismissed on the ground that the order was not final (R. 27-28). After Toth was produced in court, the District Court ordered his discharge from military custody, on the ground that no provision was made in the Uniform Code for the removal of a civilian for trial by court-martial to a point distant from the place of apprehension (R. 30-33).

On appeal, the judgment of the District Court was reversed (R. 50, 51). The Court of Appeals held that both the language and legislative history of Article 3(a) of the Uniform Code reveal the Congressional purpose to make persons discharged from military service amenable to trial by court-martial for serious crimes committed while in service which could not be tried by a court of the United States; that there is "no constitutional infirmity in amenability to trial at the place of the offense and under the law applicable to the offense at the time of its commission" (R. 39-40); and that in effect the statute "is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed" (R. 40).

SUMMARY OF ARGUMENT

Basic to petitioner's argument is the assertion that Toth was "at all times pertinent to the inquiry herein * * * a civilian" (Br. 14) "not connected in any way with the military forces" (Br. 17). Basic to our answer is the point that these characterizations misstate what is "pertinent" about both the terms of Article 3(a) and the facts of this case. It is central to the inquiry here that Toth is charged with murder at an Air Force base in Korea, committed while he was an airman wholly governed by military law and answerable to no civil tribunal of this or any other country for such an offense. These are the facts to which Article 3(a) applies and on which the constitutionality of Congress' provision for such cases must be judged. So judged, we submit, the statute is clearly valid. And Congress has not failed to provide procedures, which afford due process, to implement the military jurisdiction thus conferred.

I

A. For over ninety years Congress has exercised the power to provide for trial by court-martial of discharged servicemen for certain offenses committed while in military service. The statute so providing, first enacted in 1863, reenacted several times, and continuously in force until the Uniform Code became effective in 1951, covered generally crimes involving fraud against the United States. Unlike Article 3(a), which is questioned here, it

was not confined to cases outside the jurisdiction of the civil courts.

That long-standing enactment of 1863 has been repeatedly sustained by the lower federal courts, beginning with *In re Bogart*, 3 Fed. Cas. 796 (C. C. D. Cal.), written by Judge Sawyer in 1873. In *Hirshberg* v. *Cooke*, 336 U.S. 210, holding that a crime not involving fraud could not be tried by court-martial after expiration of the defendant sailor's enlistment, this Court pointed out that no such military jurisdiction could exist without statutory authorization and referred to the 1863 statute with no suggestion of doubt as to its constitutionality. In Article 3(a) Congress undertook to fill what, as far as *Hirshberg* revealed, was a statutory and not a constitutional gap. Nevertheless, we recognize of course that *Hirshberg* leaves open in this Court the constitutional issues petitioner raises, and we undertake to demonstrate that Congress and the lower courts have not acted contrary to the Constitution in the years since 1863.

B. Article 3(a) is a valid exercise of the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, sec. 8, cl. 14. As this Court has paraphrased its plain language, this clause authorizes Congress to provide for "the punishment of offenses committed by persons in the military service" (*Coleman* v. *Tennessee*, 97 U.S. 509, 514), to "define what shall constitute military offences, and prescribe their punishment" (*Tarble's Case*, 13 Wall. 397, 408). And Article 3(a) does precisely

this. Toth's offense was "committed * * * in the military service," and Congress has duly exercised the power to prescribe its punishment. This power has long been recognized as broad enough to reach civilians attached to or accompanying the armed forces; it has never been confined, as petitioner would confine it, to "only those persons who are actually in service" (Pet. Br. 35). It is surely broad enough to cover those in uniform, subject only to military law and triable by no civil court, whose offenses happen not to be discovered or prosecuted before their separation from service.

England, Canada, Australia, and New Zealand, with a common heritage of civilian supremacy and commonly derived military law, have enacted provisions like Article 3(a). Their action helps to demonstrate the necessity and propriety (in the sense in which the Constitution uses "necessary and proper") of such measures for regulating the military establishments our times require.

C. The Fifth Amendment's exception from the indictment requirement for "cases arising in the land or naval forces" covers precisely those cases governed by the military law Congress is empowered to prescribe under Article I, section 8, clause 14. *Kurtz* v. *Moffitt*, 115 U.S. 487, 500. Accordingly, the conclusion that the provision here in issue is authorized by Article I carries with it the conclusion that it is within the Fifth Amendment's exception. Moreover, the plain language of the exception compels the same result. A case arises "on the high seas," "in the land or naval forces,"

upon sworn charges scrutinized by the Secretary of the Air Force. The procedure compares not unfavorably with the arrest and removal of persons charged with offenses triable in the civil courts. There is no suggestion, beyond the broad claim that the Constitution forbids the military authorities to act at all, that Toth has been treated arbitrarily or unfairly. The broad claim is without substance. The assurance of sworn charges carefully reviewed, of a fair preliminary investigation, and of a fair trial—safeguarded ultimately by the right to habeas corpus should the military exceed its jurisdiction or offend against the "basic guarantees" it is enjoined to continue observing (*Burns* v. *Wilson*, 346 U.S. 137, 142-143)—amply satisfies Toth's right to procedural due process. Petitioner's due process argument cannot avail to prevent wholly the exercise of military jurisdiction once it is established that such jurisdiction was validly conferred under the Constitution by Congress.

ARGUMENT

In our view and in the view taken by Congress and the lower federal courts for over ninety years, the fundamental error in petitioner's approach to this case is embodied in the first sentence of her argument (Br. 14) declaring that Toth "at all times pertinent to the inquiry herein was a civilian." He was not a civilian at the most pertinent time involved, the time of the murder with which he is charged. He was an airman in the armed forces, subject to military law, on military assign-

ment outside the United States. The crime with which he is charged is not within the jurisdiction of any civil court of the United States; it is a violation of the Uniform Code of Military Justice governing personnel of the armed forces.[2] There is no dispute that, if his part in the death had been discovered immediately after its occurrence, before his discharge, he would have been subject to court-martial jurisdiction. Thus, there is no broad, abstract question of the power of the military to

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[2] Petitioner makes no suggestion here (cf. R. 42-43) that the offense is within the jurisdiction of any civil court. Such an argument would in any event be untenable. The offense charged was against a private individual, not an act directly injurious to the Government so as to warrant extraterritorial application of American criminal law. *United States* v. *Bowman*, 260 U.S. 94, 97-98; *Skiriotes* v. *Florida*, 313 U.S. 69, 73-74. Nor is there any basis for holding that the air base in Korea at which Toth's alleged offense occurred became American soil because American military forces were stationed thereon. In *Neely* v. *Henkel*, 180 U.S. 109, 120, this Court held that Cuba, though under the control of an American military governor, was a foreign country; see also *United States* v. *Assia*, 118 Fed. 915 (C.C. E.D.N.Y.), holding that one committing a crime on a vessel registered at a Cuban port while Cuba was under a United States governor was not subject to trial therefor in the courts of the United States.

It may also be noted, though this is not necessary to the assertion of court-martial jurisdiction over Toth, that there is at the very least serious doubt, in the American view, whether for this alleged crime on an American air base in Korea in the performance of official duties he would be subject to trial by the Republic of Korea. See *The Exchange* v. *M'Faddon*, 7 Cranch. 116, 139; *Tucker* v. *Alexandroff*, 183 U.S. 424, 433. Moreover, the United States has no extradition treaty with that Republic. Cf. *In re Lo Dolce*, 106 F. Supp. 455 (W.D. N.Y.), p. 28, n. 11, *infra*. In a word, Toth is triable by court-martial for the murder with which he is charged or he is not triable at all.

try a civilian. The precise issue is whether a soldier must be allowed to escape punishment for a serious crime committed while he was a soldier merely because his part in the crime was not discovered until after his discharge.

The injustice in the rule for which petitioner contends is self-evident. Under such a rule, it would be necessary to hold that if a murder were committed jointly by two soldiers outside the jurisdiction of a civil court of the United States, and one happened to be discharged before discovery and prosecution of the crime, the one remaining in service could be sentenced to death or confinement by a court-martial while the other escaped punishment entirely.[3] A rule requiring such an unjust result does not commend itself as reasonable. It did not commend itself to Congress, which endeavored by Article 3(a) of the Uniform Code to avoid the very result for which petitioner contends. It is the Government's position that Congress had the constitutional power to carry out its manifest purpose to provide that a discharge should not be an absolu-

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[3] According to the sworn charges against Toth (R. 15-16), this case appears to present precisely such a situation. Toth is alleged to have been an accomplice of Airman Kinder and Lieutenant Schreiber, both of whom have been tried and convicted by courts-martial. Both convictions have been affirmed by the Board of Review. Kinder has sought no further review; Schreiber's conviction is pending for review in the Court of Military Appeals. *United States* v. *Kinder*, 14 CMR 742 (February 1, 1954); *United States* v. *Schreiber*, 16 CMR 639 (June 15, 1954), Court of Military Appeals Docket No. 5468 (petition for review granted October 4, 1954; argued December 10, 1954).

tion for crimes theretofore committed" (R. 40) while subject to military authority; that Congress implemented this purpose with provisions for apprehension and trial by court-martial of persons within the statute; and that these procedures present no basis for complaint under the Constitution.

I

The Constitution Empowers Congress to Provide for Trial By Court-Martial of Crimes Committed by Members of The Armed Forces, Despite Their Subsequent Separation from the Service

Petitioner cannot and does not dispute that Congress intended in Article 3(a) of the Uniform Code to confer court-martial jurisdiction over crimes of the category here presented—*i.e.*, serious crimes, not triable by a civil court of the United States, committed by persons subject to military law who were discharged before charges were preferred against them. Article 3(a) is explicit in this matter.[4] It provides:

[4] Article 3(b) and (c) provide:

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of article 43, be subject to trial by court-martial on said charge and shall after apprehension be subject to this code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.

> Subject to the provisions of article 43,[5] any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Judged by its actual application in this case, the Article is clearly valid. It represents a power Congress has exercised for over ninety years with the repeated approval of the lower federal courts. It falls squarely within the constitutional grant in Article I, section 8, clause 14, of power "To make Rules for the Government and Regulation of the land and naval Forces" and within the Fifth Amendment's exception to the indictment requirement for "cases arising in the land or naval forces."

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[5] Article 43 of the Code provides that for all but a few crimes or offenses, exemption from liability to be tried by a court-martial may, with certain limitations, be claimed after two (or three) years. Article 43 also provides that persons charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder may be tried and punished at any time without limitation.

A. *The power in question has been exercised by Congress and sustained by the courts for over ninety years.*

The question here is not a novel one. Beginning in 1863, Congress provided that separation from military service would not operate to bar trial by court-martial for crimes involving fraud against the Government committed while the accused was in service.[6] Unlike Article 3(a) of the present Uniform Code, the statute governed frauds generally and was not confined to cases where no civil court of the United States had jurisdiction to try the offense. It applied, moreover, without regard to the punishment which might be imposed, whereas Article 3(a) is effective only where the offense is punishable by more than five years' imprisonment. The long-standing enactment of 1863, renewed on several occasions and remaining continuously in force until the date of the Uniform Code,[7] is in itself a weighty legislative judgment in favor of the power now questioned again. It must, as petitioner necessarily recognizes (Br. 10-11), be condemned as a persevering violation of the Constitution if the present attack on Article 3(a) is to prevail.

The lower courts, however, have repeatedly up-

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[6] Act of March 2, 1863, 12 Stat. 696, 697.

[7] Provisions substantially similar to the original Act appear as Article of War 60, R.S. 1342 (1878); Article of War 94 (1920), 41 Stat. 805, 10 U.S.C. (1946 ed.) 1566; Article of War 94 (1948), 62 Stat. 640, 10 U.S.C. (1946 ed., Supp. IV) 1566; Article 14 (Eleventh), Articles for the Government of the Navy, R.S. 1624 (1878), 34 U.S.C. (1946 ed.) 1200.

held the 1863 statute. Beginning in 1873, in *In re Bogart,* 3 Fed. Cas. 796 (C.C.D. Cal.), arguments precisely like those the petitioner urges have been rejected and Congress has been found to have power to require trial by court-martial of discharged servicemen for crimes committed in the service. *Ex parte Joly,* 290 Fed. 858 (S.D. N.Y.); *Terry* v. *United States,* 2 F. Supp. 962 (W.D. Wash.); *United States ex rel. Marino* v. *Hildreth,* 61 F. Supp. 667 (E.D. N.Y.); *Kronberg* v. *Hale,* 180 F. 2d 128 (C.A. 9), certiorari denied, 339 U.S. 969.[8] The lone decision to the contrary, *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661 (S.D. N.Y.), the error of which is repeated by petitioner and discussed below (pp. 38-39), was reversed by stipulation in an unreported order of the Second Circuit. No. 20235, April 18, 1946; see *Kronberg* v. *Hale, supra,* at 130.[9]

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[8] Petitioner correctly observes (Br. 20-21) that Colonel Winthrop, an admittedly eminent authority in the field of military law, doubted the constitutionality of the 1863 statute. But as the court pointed out in *Ex parte Joly, supra,* at 860, the Colonel recognized that his views were contrary to judicial precedent. *Military Law and Precedents* (2d ed., 1920 reprint), pp. 106-107. Professor Morgan, who was to play a leading role in the drafting of the Uniform Code of Military Justice, concluded in 1920 that the matter of continuing court-martial jurisdiction for crimes committed in the service presents no constitutional difficulty. *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War,* 4 Minn. L. Rev. 79, 83-84.

[9] Other cases cited by petitioner (Br. 30-31, 35) along with *Flannery* concern the statutory jurisdiction of courts-martial not the scope of the power of Congress to confer such jurisdiction. As reflected by its citation in *Hirshberg* v. *Cooke,* 336 U.S. 210, 214, *Ex parte Henderson,* 11 Fed. Cas. 1067

In *Hirshberg* v. *Cooke*, 336 U.S. 210, holding that there was no statutory authority for trial by court-martial of a crime outside the purview of a successor to the 1863 statute following termination of the enlistment during which the crime was committed, this Court found the statute persuasive that Congress had acted "on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service." P. 215. The Court then observed *(ibid.)* that "Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined —frauds against the Government." There was, to be sure, no need to consider in *Hirshberg* the constitutional validity of Congress' judgment that it could exercise the power asserted in the 1863

(C.C. D. Ky.), concerned a portion of the 1863 statute under which a civilian war contractor, who had never been in the military service, was brought to trial before a court-martial. The court there stressed the fact that there was no allegation that the relator "is or has been an officer or soldier in the army" (p. 1069; see also p. 1071), thus clearly distinguishing the problem of the present case and the cases cited above in the text.

A less important matter bears brief mention. Though not reported until 1878, and described by petitioner (Br. 34) as being written "with full knowledge of the *Bogart* opinion" (*supra*), the *Henderson* decision appears from internal evidence to have been rendered some time in 1866 or 1867, considerably before the decision of *Bogart* in 1873. See 11 Fed. Cas. at 1068, indicating that the writ there granted was applied for on April 23, 1866. The remainder of the opinion shows that there was some delay in disposing of the case, but not extending to years, and that it was decided while the Civil War remained very recent.

statute. It seems noteworthy, nevertheless, as two Courts of Appeals have observed, that "There is in the opinion no intimation of possible doubt as to the authority of Congress to make such a grant in circumstances believed by it to be necessary." *Kronberg* v. *Hale*, 180 F. 2d 128, 131 (C.A. 9), certiorari denied, 339 U.S. 969; opinion below, R. 41-42. This Court merely described the 1863 grant as a "comparatively slight expansion of the court-martial power" (336 U.S. at 215, n. 2)—though it was in significant respects broader than Article 3(a). (*supra*, p. 17)—and held only that, without such a statute, discharged servicemen could not be tried by court-martial for offenses committed in the service.

And so Congress undertook in Article 3(a) to fill the statutory gap evidenced by the *Hirshberg* decision. As originally drafted, this Article had provided that reserve personnel who had committed an offense while in a status in which they were subject to the Code might be placed in an active-duty status for the purpose of disciplinary action. H.R. 2498, 81st Cong., 1st Sess.; see Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, House of Representatives, 81st Cong., 1st Sess., p. 567. During the hearings, questions were raised concerning *Hirshberg*. Professor Morgan observed that the decision had been based upon a construction of the Articles then in force, and Congressman Elston expressed the view that the situation should be changed. House Hearings, *supra*, at 617. Mr. Elston noted that,

under the then existing law, a "man might commit murder the day before his term of enlistment was up and step out of the service" immune to prosecution (*id.*, p. 882), and commented on the unfairness of prosecuting a soldier remaining in service while one who was discharged escaped punishment for the same offense (*id.*, p. 883). It was agreed that the proposed provision should not cover minor offenses or offenses triable by the civil courts. *Id.*, pp. 882-884.

Discussing the Article 3(a) which resulted from these deliberations the House Report stated (H. Rep. No. 491, 81st Cong., 1st Sess., p. 5):

> As a matter of fact, the military authorities have been most reluctant to prosecute the average offender who succeeds in returning to a civilian status before the discovery of his crime. On the other hand, the military authorities have found themselves confronted with a lack of jurisdiction to try certain aggravated cases of this character. You will recall the Durant jewel case. That case involved the theft of the crown jewels of Hesse. At the time Mrs. Durant, one of the accused, was apprehended, she was in a terminal-leave status. The point was raised by a petition for a writ of habeas corpus that the Army had ceased to have jurisdiction over the accused since her active service was terminated and she was only completing the unexpired portion of her terminal leave. A writ of habeas corpus

was granted in district court but ultimately reversed on the theory that the terminal-leave status is a service status and subjects one to the Articles of War. If charges and specifications had not been served on the accused until after the expiration of her terminal leave, neither the military nor our Federal courts would have had any jurisdiction over the case. You will also recall the more recent Hershberg [*sic*] case. Hershberg [*sic*] was a Navy enlisted man who allegedly abused other American military personnel who were under his supervision while they were all prisoners of war of the Japanese. Hershberg's [*sic*] term of enlistment expire and after 1 day he reenlisted. The Navy then attempted to prosecute him for the alleged abuse of American persons. *A writ of habeas corpus was granted in that case, not because it would be unconstitutional to provide for a continuing jurisdiction in such cases, but because the present Navy statute confers no such continuing jurisdiction.*

We felt that there was a solution to this problem and our proposed solution is offered in article 3(a) which is a committee amendment to H.R. 2498. It provides for a continuing jurisdiction provided the offense against this code is punishable by confinement of 5 years or more and provided further that the offense is not triable in a State or Federal court of the United States. We feel that this will pro-

vide ample protection against any capricious action on the part of military authorities, will limit military jurisdiction to serious offenses that could not otherwise be tried by military or Federal courts and will likewise correct the absurd situation of permitting an honorable discharge to operate as a bar to a prosecution for murder or other serious offenses. [Emphasis added.]

Although the Judge Advocate General of the Army opposed Article 3(a) as amended, recommending that offenses in the service by servicemen thereafter discharged, even though committed overseas, be made triable by civil courts (Hearings before a Subcommittee of the Committee on Armed Services on S. 857 and H.R. 4080, United States Senate, 81st Cong., 1st Sess., pp. 256-257), the Senate Committee agreed with the House version. Its report (Sen. Rep. No. 486, 81st Cong., 1st Sess., p. 8) states:

Article 3. *Jurisdiction to try certain personnel.* Subdivision (a) represents a House amendment to the bill as originally introduced. Under existing law, the armed forces lose jurisdiction over military personnel who have been lawfully separated from service. This fact has been clearly established in the recent Federal court decision in the Hershberg [*sic*] case. Inasmuch as the Hershberg [*sic*] case involved an offense which was committed beyond the jurisdiction of our State and Federal

courts, there is no tribunal which has any jurisdiction over the person or the offense. It is clearly apparent that some persons can escape trial by court-martial by the mere lawful termination of service. This is not a desirable situation. On the other hand, it is desirable to place some limitations on continuing jurisdiction over persons who commit offenses while subject to military law and who terminate their military status before apprehension. In the opinion of the committee the present provisions of this subdivision provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities.

There is no doubt, then, that the Congress which enacted Article 3(a) was concerned with precisely the type of situation this case presents. And ninety years of history lend powerful sanction to the remedy Congress chose. The fact remains, however, that the issues petitioner poses have not been considered on their merits by this Court. And so we turn to a fresh re-examination of these issues to show that Congress, the lower courts, and the military authorities have not been guilty of violating the Constitution for almost a century.

B. *Article 3(a) of the Uniform Code of Military Justice is within the power of Congress "To Make Rules for the Government and Regulation of the land and naval Forces."*

As a necessary accompaniment of its power under the Constitution "To raise and support Armies" and "To provide and maintain a Navy" (Art. I, sec. 8, cls. 12 and 13), Congress has power "To make Rules for the Government and Regulation of the land and naval Forces" (*id.*, cl. 14). Describing these powers in a close paraphrase of the Constitution's own terms, this Court has pointed out that Congress "can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment." *Tarble's Case*, 13 Wall. 397, 408. Again, speaking of what the Framers intended by the plain language of clause 14, the Court found "that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations * * *." *Dynes* v. *Hoover*, 20 How. 65, 79.[10]

[10] As early as 1760, it was recognized under English military law, from which our military law derived directly (*Caldwell* v. *Parker*, 252 U.S. 376, 382; Winthrop, *Military Law and Precedents* (2d ed., 1920 reprint), pp. 21-22), that separation from military service would not necessarily terminate amenability to court-martial jurisdiction. Thus, Tytler, in *Military Law* (3d ed., 1814), pp. 113-114, wrote:

> It had formerly been a matter of doubt, whether an officer or soldier, after being dismissed or discharged from his Majesty's service, could be brought to trial before a Court-Martial, for a crime committed while he was in

Though it plainly authorizes Congress to prescribe trial by court-martial of offenses by some civilians —*i.e.*, persons who are members of the armed forces neither at the time of their offenses nor when they are brought to trial (p. 31, n. 14, *infra*)—the most unmistakable effect of clause 14 is its grant of "plenary" power to provide for "the punish-

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commission, or in pay; the terms of the before mentioned clause apparently confining the operation of the Military law to those who are actually either in commission or in pay. The point came to be solemnly determined in the case of Lord George Sackville, who immediately on his return to England, after the battle of Minden, had been deprived by his Majesty of all military command and commission, but was not brought to trial for his conduct in that engagement till some months afterwards, in consequence of his own demand of a Court-Martial. The question was referred to the opinion of the twelve Judges, who, by their answer, unanimously declared, that "they saw no ground to doubt of the legality of the jurisdiction of a Court-Martial in those circumstances."

Commenting on this report, a decision in the Supreme Judicial Court of Massachusetts in 1830 observed (*Walker* v. *Morris*, 3 American Jurist 281, 287):

> It is true that that trial was had on the application of the party accused, who having been dismissed from the service during his absence from England, thought it was due to his reputation, upon his return, to demand an investigation of his conduct, to relieve himself from the disgrace. But I do not perceive that this circumstance can affect the principle of the decision; for if the court martial had no jurisdiction, it is very clear that the consent of the accused could not confer it.

In 1865, two years after it created continuing court-martial jurisdiction for crimes of fraud (*supra*, p. 17), Congress provided that an officer could, as in the above-described English case, request a court-martial trial to test his dismissal by the President. Act of March 3, 1865, Sec. 12, 13 Stat. 487, 489; see Winthrop, *op. cit.*, *supra*, pp. 64-65. Today's similar provision is Article 4 of the Uniform Code (50 U.S.C. 554).

ment of offences committed by persons in the military service * * *." *Coleman* v. *Tennessee*, 97 U.S. 509, 514. And this, of course, is precisely the power cautiously exercised by Congress in Article 3(a) and carefully applied to this case of Robert Toth, who, it is charged, is guilty of a murder committed while he was "in the military service."

Considering for the moment the language of Article I alone, only an extraordinarily hostile construction could deny to Congress the power petitioner questions. See Morgan, *"Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 83-84 (1920). Alerted by the decision of this Court in *Hirshberg* v. *Cooke*, 336 U.S. 210, and concerned with the government of armed forces which the necessities of our time have deployed across the world, Congress recognized that shocking offenses by members of those forces might go wholly unpunished if the offenders succeeded in being separated from the service before discovery or prosecution of their crimes. See *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y.); Myers and Kaplan, *Crime without Punishment*, 35 Geo. L. J. 303 (1947); pp. 20-24, *supra*. It was entirely reasonable to conclude that this possibility represented, in the most sharply literal sense, a gap in our "Rules for the Government and Regulation of the land and naval Forces." And Congress, in the traditional spirit of guarded conservatism which has characterized its grants of military jurisdiction (cf. *Burns* v. *Wilson*, 346 U.S. 137, 140-141), legislated narrowly to reach

only the formerly ungoverned class of serious crimes like the one in this case.[11]

The resulting Article 3(a) is a plainly "appropriate" exercise of the power to govern the land and naval forces—"necessary and proper" in the sense in which the phrase confides to the judgment of Congress the choice of achieving legitimate ends by means consistent "with the letter and spirit of the constitution * * *." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Legal Tender Case*,

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[11] The present case is an apt illustration of the problem in one of its aspects. According to the charges against Toth (R. 16, 89; and see R. 59-60, 61-62), the crime of which he is accused was the deliberate shooting, following a pistol-whipping, of a Korean national while our forces were stationed in South Korea and fighting in its support. It needs no argument to demonstrate that certain punishment of such offenses is an appropriate adjunct of our massive efforts to make and sustain and keep allies around the world.

The problem is not confined, of course, to crimes against foreign nationals. The *Lo Dolce* case, cited in the text above, involved the murder of an American major by subordinates with whom he was engaged in partisan operations behind enemy (German) lines in Italy during World War II. The crime was discovered only following separation from the service of the alleged perpetrators. The Italian Government failed in its effort to extradite Lo Dolce, who had admitted his part in the crime; no civil court of the United States could try him; and the then existing Articles of War made no provision for trial by court-martial. *Hirshberg* v. *Cook, supra*. The House Subcommittee investigating the case, after concluding that there was no way of bringing the murderers to justice, observed that "The Uniform Code of Military Justice now provides a stop-gap for further incidents of this nature as reflected in the present Toth case * * *." Report of the Special Subcommittee of the Committee on Armed Services, under the Authority of H. Res. 125, 83d Cong., 1st Sess. ("Report and Recommendations surrounding the Disappearance of Maj. William V. Holohan"), p. 15 (July 16, 1953).

110 U.S. 421, 440.[12] Other "civilized nations" (see *Dynes v. Hoover, supra*, at 79), with a commonly derived military law and a common heritage of concern for individual liberty and the subordination of military to civilian power, have found necessary the enactment of measures comparable to Article 3(a). Thus, a discharged British, Canadian, or Australian serviceman, charged with a crime like the one of which Toth is accused, would remain, like him, subject to apprehension by the military and trial by court-martial.[13] Common

[12] "The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." Constitution, Art. I, sec. 8, cl. 18.

[13] Section 158 of the British Army Act (Gt. Brit., Stat. Rev. (3d ed.), vol. X, 457, 563-564; War Office, *Manual of Military Law*, Pt. I, 1951, 376-377) provides:

> (1) Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject:
>
> Provided that where a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence, except in the case of the offence of mutiny, desertion, or fraudulent enlistment, unless his trial commences within three months after he had ceased to be subject to military law, or *unless the offence was committed outside the United Kingdom and is an offence which when committed in England is punishable by the law of England, and the Attorney General consents to the trial* * * *. [Emphasis added.]

See also the Defence Act of Australia, Section 103(3), Commonwealth Acts, vol. II (1901-1950), 1560, 1596; National

problems of control and discipline over military personnel, dramatically evidenced by the joint Korean operations during which the alleged offense in this case occurred, have evoked these closely similar legislative solutions. The similarities are impressive not only because it is in a general way pertinent that the power of Congress to govern the armed forces was designed as one "to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations * * *." *Dynes* v. *Hoover*, *supra*, at 79. More specifically, these analogous enactments testify to the conclusion we have thought plain enough from the language of the Constitu-

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Defence Act of Canada, 1950, Sections 56(2) and (3) and 68(f), Revised Statutes of Canada, 1952, vol. III, 3814 and 3821.

New Zealand has a similar statute (Army Act, Section 127 (1), New Zealand Statutes, 1950, 283, 370-371). We have omitted mention of New Zealand in the text only because its three-month limitation on prosecutions after separation from the service, unqualified by the exception emphasized above in the British Act, would appear to exclude a person like Toth against whom charges were not signed until four months after his discharge. However, the important point remains, of course, that New Zealand like the others has found it necessary and proper to extend court-martial jurisdiction for offenses committed in the service beyond the date of the offender's separation from the service. The rest is for present purposes unimportant detail—including among other things the fact that none of the four statutes cited confines post-separation military jurisdiction, as does the American statute, solely to offenses not triable in the civil courts.

The British Army Act, including the provision in Section 158 for court-martial after termination of military service, dates from 1881. 17 Law Reports, (Statutes), 44 and 45 Vict., 260, 331.

tion itself—that a provision like Article 3(a) is in fact a fitting exercise of control over the armed forces, falling squarely within the language and purpose of the authorization "To make Rules for the Government and Regulation of the land and naval Forces."[14]

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[14] It may be noted that petitioner is mistaken in the generalization (Br. 35) "that only those persons who are actually in service are amenable to military trial and justice." The jurisdiction has never been so limited. Civilians accompanying the armed forces but never "actually in service" as members of the armed forces have long been subject to trial by courts-martial—including not only persons employed by the military (*United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904; *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645; *Ex parte Gerlach*, 247 Fed. 616 (S.D. N.Y.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); *Grewe* v. *France*, 75 F. Supp. 433 (E.D. Wis.); see *Madsen* v. *Kinsella*, 343 U.S. 341, 349; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, 315), but even, it seems clear, so non-military a civilian as a soldier's wife accompanying him overseas (see *Madsen* v. *Kinsella*, *supra*, at 345, 349-352). And persons serving sentences imposed by courts-martial—who, far from being "actually in service," have been dishonorably discharged from such status—are likewise triable by court-martial for offenses during confinement. *Kahn* v. *Anderson*, 255 U.S. 1; *Mosher* v. *Hunter*, 143 F. 2d 745 (C.A. 10); cf. *Carter* v. *McClaughry*, 183 U.S. 365.

We do not cite these instances of court-martial jurisdiction over persons not in the military service as dispositive of the present problem. Indeed, we think the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces. The cases referred to do, however, help to dispel the notion that a civilian, by virtue of being a civilian rather than a soldier, is always necessarily beyond the reach of military law.

C. Article 3(a) is within the Fifth Amendment's exception for "cases arising in the land or naval forces".

The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* * * *." (Emphasis added.) It is settled, of course, that Congress may provide for trial by court-martial of cases within the exception we have italicized. *Ex parte Quirin*, 317 U.S. 1, 40; *Madsen* v. *Kinsella*, 343 U.S. 341, 360 n. 26. But petitioner contends that Article 3(a) is invalid and that Toth may not be tried by court-martial because this case falls outside the Fifth Amendment's exception. Though Toth was serving in the armed forces at the time of his alleged offense, though he and the offense were unquestionably governed solely by military law at the time, petitioner contends that this "case" cannot be deemed one "arising in the land or naval forces" because the court-martial proceedings were not instituted until after his discharge. The argument is refuted by the plain language of the exception and by its purpose in the constitutional scheme.

If, as we have argued above, Article 3(a) is authorized by the constitutional grant in Article I, section 8, clause 14, to make rules for the government of the land and naval forces, this should in itself be sufficient to defeat the contention petitioner predicates upon the Fifth Amendment. For

the exception in that Amendment was designed precisely as an *exception* to the Amendment's reach, not as an abridgement of the power already conferred by Article I. The plain purpose and meaning of the exception for "cases arising in the land or naval forces" is that it "leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the First Article of the Constitution, Congress is empowered to make." *Kurtz* v. *Moffitt*, 115 U.S. 487, 500; see also *Ex parte Milligan*, 4 Wall. 2, 137-138 (concurring opinion of Chief Justice Chase joined by Justices Wayne, Swayne, and Miller). It seems probable that, had no such exception been written, the requirements of indictment and trial by jury would nevertheless have been held inapplicable to courts-martial, as they are to other military tribunals. *Ex parte Quirin*, 317 U.S. 1, 38-45. The fact that the exception was made explicit affords no ground for the claim that the power thus expressly preserved was at the same time diminished, with no change in or reference whatsoever to the clause of Article I in which the power finds its source.

When we turn to the exact language of the Fifth Amendment, it clearly presents no such barrier as petitioner finds to punishment by court-martial for offenses under military law despite the offender's subsequent separation from the service. This "case" "arose" in the armed forces, not only in the ordinary dictionary sense petitioner condemns (Br. 33-34), but also in a sense which has long been

familiar to the law. It arose there in the wholly sufficient sense that (1) Toth was a member of those forces at the time of his alleged offense and (2) the offense was one against the rules governing those forces and against those rules alone. To find in the phrase the further requirement petitioner proposes—that the court-martial proceedings must be commenced while the defendant is still in the armed forces in order that the case may be deemed to "arise" therein—distorts the English language.

It is surely common, familiar usage of lawyers, as it was when the Constitution was written, to refer to "the waters on which * * * cases may arise" (*United States* v. *Bevans*, 3 Wheat. 336, 388), to a "case of collision taking place on the Mississippi river" (*Waring et al.* v. *Clarke*, 5 How. 441, 466), to a "cause of action arisen on the ocean" (*id.* at 467), to "cases * * * arising on the high seas" (*id.* at 487, dissenting opinion).[15] Such usage, of which we present simply the first random instances that have come readily to hand, refers of course to the locale of events, not to where any of the litigants are situated when their legal proceedings begin. It reflects the well-understood fact that a "case" is properly described as "arising"—and particularly for the purpose of determining the law which governs it—at the time and place of the happenings which give rise to it. See *De Lovio*

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[15] The dissent last cited quotes from Blackstone (3 Bl. Comm. 106) a reference to "causes arising wholly upon the sea * * * *." 5 How. at 487.

v. *Bolt*, 7 Fed. Cas. 418, 432, 434-435 (C.C.D. Mass.) (Story, Circuit Justice).

The point was simply and adequately made in 1863 when Congress first decreed that members of the armed forces violating military law should remain amenable to trial by court-martial after separation from the service. Senator Howard, in charge of the bill, said (Cong. Globe, 37th Cong., 3d Sess., 953):

> The question arises, what is a "case arising in the land or naval forces of the United States?" There is not any doubt that a soldier or officer who has enlisted in the service of the United States is or may be made subject to martial law. Why is he made subject to martial law? Because being in the service of the United States, the act committed by him is a case arising in that service.

There was no dissent from this proposition. The "grave doubts" petitioner describes (Br. 32, n. 7) as to the constitutionality of the bill were directed exclusively to the proposal to subject war contractors, who were at no time actually members of the armed forces, to trial by court-martial for fraud. Cong. Globe, *supra*, 953-958; see *Hirshberg* v. *Cooke*, 336 U. S. 210, 214. No one suggested any doubt that an offense against military law by one in the armed services creates a case "arising in the land or naval forces," punishable by court-martial, as the bill provided, though the offender's

service ended before proceedings were begun against him.

And the courts, as we have noted, have agreed. In the earliest of the cases rejecting the argument petitioner revives here (*In re Bogart*, 3 Fed. Cas. 796, C.C. D. Cal., 1873), Judge Sawyer said (pp. 799-800):

> If the acts of congress conferring jurisdiction upon naval and military courts-martial, to try offenses committed in the naval and military service, are held to be constitutional, it is further insisted, on behalf of the petitioner, that the offense must not only be committed, but that the jurisdiction must also be exercised, or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal or other discharge; that congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. To support this view, a criticism is made upon the word "case," and it is argued that, although the offense has been committed while in the naval service, yet a "case" does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a "case arising in the land or naval forces" within the meaning of the fifth amendment to the con-

stitution. This is certainly a very finely drawn distinction. It is not merely a "case" that the court is to try, but "a case arising in the land or naval force." A case in ordinary parlance is that which falls, comes, or happens—an event. Also a state of acts involving a question for discussion. Webst. Dict. But the event—that which happens—the state of facts presenting the question for discussion, must have arisen—must have had an origin. What does "arising" mean as here used? Certainly not merely making a statement of the pre-existing facts, which constitutes a case for judicial cognizance. Among the ordinary and most common definitions of the word "arise," are "to proceed, to issue, to spring," and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service. A case originating in the naval forces or service, or, in other words, "offenses" against the laws regulating the navy, committed by a party while in the naval forces. * * * There is, certainly, no express limitation of the power of congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased. If the limitation exists, it must be implied from a strained and unnatural construction to be given to the

clause, "cases arising in the land and naval forces."

In support of the "strained and unnatural construction" thus sufficiently demolished eighty years ago, petitioner invokes decisions interpreting the provision in Article III of the Constitution for "cases * * * arising under" the Constitution, laws, and treaties of the United States (Br. 27-30). Not surprisingly, these decisions, in determining the nature of a "case" or "controversy" *within the judicial power*, refer to proceedings brought into court before judges. And there is certainly no occasion here to quarrel over the tautology that a "case" before a court is a legal proceeding already instituted by appropriate legal process. The important point remains that not a word in the decisions petitioner cites alters the clear linguistic fact that when a "case" is described as "arising" in a particular place—"on the high seas" or "in the land or naval forces"—the reference is to the place of the events subsequently litigated, not to the litigation itself.

Petitioner's fallacy is the familiar one of attempting to transplant perfectly suitable meanings from the context in which they fit to contexts in which they have no place. Cf. *Towne* v. *Eisner*, 245 U.S. 418, 425. The hopelessness of the effort is adequately illustrated here by one of the authorities petitioner cites. The first sentence of the opinion in *Muskrat* v. *United States*, 219 U.S. 346,

begins: "These cases arise under an act of Congress" (p. 348). Thereafter, the Court repeatedly refers to the matters before it as "cases" (*e.g.*, pp. 351, 357, 360, 363), which is obviously what they were. Yet the decision was of course that they were not "cases" at all within the meaning of Article III of the Constitution. Fairly described as "cases [arising] under an act of Congress" (in the statutory sense), they were nevertheless not "cases * * * arising under * * * * the laws of the United States" (in the sense of Article III).

We submit, in sum, that petitioner's definition of the exception in the Fifth Amendment is untenable. It would appear by that definition that a trial by court-martial could be had for a civilian crime, wholly unconnected with the armed forces, if the accused subsequently joined and was brought to trial in the service. For this presumably would be, according to petitioner, a case "arising" in the armed forces. The suggested construction is both too narrow and too broad; it misses the point of the constitutional provisions. The issue is to be resolved, not by tearing the words "case" and "arising" from the wholly different context of Article III, but by reading the language of the exception in its ordinary meaning and by relating the exception to the cases provided for in Article I which were designed to be excepted.

II.

Congress Has Provided Effective Procedures, Which Accord With Due Process, for the Apprehension and Trial Of Discharged Persons Subject to Military Jurisdiction

Two contentions are considered here: First, petitioner argues (Br. 37-43) that, despite the clearly expressed purpose of Congress to extend court-martial jurisdiction to cases such as this, Congress neglected to provide the machinery necessary to this end—that it provided for neither apprehension nor confinement of persons like Toth. Alternatively, petitioner claims (Br. 36-37) that if the necessary procedures exist, they violate due process. Both arguments are erroneous.

A. The procedures are plainly prescribed by the Code

In the argument that Congress made no provision for apprehending and holding for trial persons within Article 3(a), petitioner misreads Articles 7 and 9 of the Uniform Code, which fully and clearly cover this problem. These Articles provide in pertinent part:

> Article 7 (50 U. S. C. 561):
>
> (a) Apprehension is the taking into custody of a person.
>
> (b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the

person apprehended committed it. [Emphasis added.]

Article 9 (50 U. S. C. 563):

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, *or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject*, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. [Emphasis added.]

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

No more is required than a reading of these Articles to demonstrate that Congress provided specifically for the apprehension—"taking into custody" (Article 7(a))—and restraint or confinement (Article 9(a) and (c)) of persons subject

to trial by court-martial under Article 3(a).[16] It is suggested (Pet. Br. 43) that Article 7 confers no authority to apprehend Toth because it applies to "persons subject to this code," a phrase which, petitioner says, is a term of art referring only to persons specified in Article 2. But the suggestion stops short of the decisive language of Article 7, which authorizes apprehension of "persons subject to this code *or to trial thereunder*. * * *." The words we have emphasized cover precisely persons like Toth and others included in the various provisions of Article 3, all of which deal with persons who have committed offenses while in military service and have either deserted or been discharged from the service before the time of their apprehension.

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[16] As the Articles themselves state, the Code uses the term "apprehension" (Article 7) to mean what is commonly described in civilian terminology as "arrest." The terms "arrest" and "confinement" as used in Article 9 cover the detention of an apprehended person pending trial. At the House Hearings, *supra*, p. 902, the terminology was explained by Mr. Larkin of the Office of the Secretary of Defense as follows:

> This is new in format, more than in anything else, Mr. Chairman. In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words "arrest", "restraint", "confinement", and words of that character, and we adopted this scheme to clarify the definitions of those words and started off with "apprehension" in article 7.
>
> * * * * * * *
>
> Article 7, then, is part of a whole revision, the rest of which is contained in articles 9 and 10 and I think just clarifies it. It clarifies the whole notion of what is arrest, restraint, confinement, and so forth.

Next, petitioner claims (Br. 40) that "there is no authority to hold him in custody once his apprehension has been effected." This conclusion is said to follow (Pet. Br. 39, 42) from the fact that Article 9(c) provides that "a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject*" (emphasis added). Toth, petitioner says (Br. 39), "as a civilian, had no commanding officer 'to whose authority he is subject.'" But the Article just quoted refers explicitly to "a civilian subject * * * to trial" under the Code and leaves no doubt, when read with the jurisdictional grant in Article 3(a), that there is of course "a commanding officer to whose authority" such a civilian is subject. That commanding officer is designated in due course by order or regulation.

Petitioner's argument comes down to the frivolous suggestion that, in the face of what Congress explicitly wrote, the carefully detailed procedures come to nought because the Code does not *specify* the commanding officer to whose authority Toth was subject. The same argument could be made for a deserter whose unit or organization has been inactivated before his apprehension. Indeed, the argument could be made for any soldier or civilian "subject to this code or to trial thereunder," for there is nowhere in the Code any designation of the particular commanding officer of Private Jones or of a civilian "serving with, employed by, or accompanying the armed forces" outside the United

States who is made subject to the Code by Article 2(11), 50 U. S. C. 552(11). The short of this matter is that the Code outlines in ample detail the nature of the military jurisdiction and the accompanying powers of officers in the military establishment. The particular individuals exercising these powers in a particular case are, naturally, not named or designated by specific rank and organization in the Code. These details, like the command of armies in the field, are necessarily filled in by appropriate orders and regulations duly delegating the authority Congress conferred.

There is no suggestion that any step in the apprehension and restraint of Toth, beginning with the direction of the Secretary of the Air Force (R. 19-20), was accomplished otherwise than by officers exercising proper command authority. There is only the claim that the meticulous legislative efforts expended on Articles 3(a), 7, and 9 cannot possibly work because, despite them, Toth cannot possibly be viewed under the statute as being subject to the authority of any commanding officer. Mr. Justice Holmes more than answered such an argument when he said "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1). Here, Congress has plainly "said it" and there is no ground for the argument, as petitioner herself describes it (Br. 42), that the legislation was written in "a confounding or abortive manner."

B. *The procedures applicable to persons within Article 3(a), as they are to other persons subject to trial under the Code, accord with due process*

There is no question that Toth was given ample opportunity to test the military jurisdiction before his removal to the place of his alleged crime in Korea (see R. 64, 70) and that he has had such an opportunity on this petition for habeas corpus after his arrival in Korea. Nor is there any suggestion of doubt that other persons subject to trial by court-martial may be brought to trial in any appropriate place.[17] Petitioner argues, however (Br. 36-37), that Toth's right to due process was violated when he was apprehended, held, and brought for trial to the place of his alleged offense in Korea.

The argument is without foundation. If, as we think has been demonstrated, the Constitution empowers Congress to provide for military jurisdiction over Toth, there is no ground for prohibiting the exercise of this jurisdiction by means of the procedures generally applicable. Congress has provided that Toth, like other Americans subject to military law, shall have a fair trial conforming "to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." *Burns v. Wilson*, 346

[17] There is no territorial limitation upon the jurisdiction of courts-martial. Article 5 of the Uniform Code (50 U.S.C. 555) provides that "This code shall be applicable in all places." See Winthrop, *op. cit. supra*, p. 81.

U. S. 137, 143. It has narrowly confined the power here in question; the power has been exercised with care and on high authority. Due process requires no more.

1. Article 3(a), as we have noted, is limited to discharged servicemen whose alleged offenses committed in the service are both serious and outside the jurisdiction of any civil court.[18] Article 30 (50 U. S. C. 601) provides generally that charges may be preferred only under oath and by a person subject to the Code who "has personal knowledge of, or has investigated, the matters set forth therein * * *." And paragraph 11*b* of the *Manual for Courts-Martial* provides that jurisdiction under Article 3(a) "should not be exercised without the consent of the Secretary of the Department concerned." Thus, the statutory provision and the implementing regulations are designed to insure that,

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[18] Petitioner forecasts (Br. 45) that because the Table of Maximum Punishments (*Manual for Courts-Martial*, 1951, par. 127*c*) is suspended in time of war for certain offenses involving essentially military discipline (*id.*, p. 217), and because the President ordered such suspension for the certainly war-like situation of the Far East Command in 1951, the purpose of Congress to limit to serious offenses the continuing military jurisdiction over discharged personnel will not be respected. No such question is here involved. In this case the charge is murder, and murder is the very type of the serious offense with which Congress was concerned. So there is no need now to accept or reject petitioner's abstract assumption that, in time of war, a day's absence without leave or missing a movement would necessarily be a trivial offense. Moreover, it is extremely doubtful whether the problem will ever arise under Article 3(a). Breaches of military discipline like unauthorized absence are offenses most likely to be discovered upon commission and punished before discharge.

as the present case illustrates, discharged servicemen will be apprehended for trial by court-martial only after careful judgments that there is probable cause for exercising the narrowly-confined jurisdiction Congress conferred.

After apprehension, a person in the situation of Toth, like others subject to court-martial jurisdiction, has a number of important procedural rights —the right to preliminary investigation under Article 32 (50 U. S. C. 603), to preliminary review of the charges under Article 34 (50 U. S. C. 605), and to representation by counsel under Articles 32 and 38 (50 U. S. C. 603, 613). He has, of course, all the rights conferred by the Code to insure a fair trial and adequate review. He is treated equally with other persons charged with similar crimes committed in similar circumstances—*i.e.*, while in the armed forces. These procedures afford due process to persons in service. The procedures of a military tribunal afford due process to a citizen triable by a military tribunal under the law of war. *Ex parte Quirin*, 317 U. S. 1. They are no less constitutional as to persons who committed crimes while in service and are subject to trial by court-martial despite their discharge from service before trial.

2. There is nothing strange to American tradition or offensive to the Constitution in empowering the military authorities to act directly against a person who is subject to court-martial jurisdiction, even when the defendant is not actually in the armed services when he is brought to trial. See

Martin v. *Mott*, 12 Wheat. 19. Indeed, in *Kurtz* v. *Moffitt*, 115 U. S. 487, pointing out that in this country "the line between civil and military jurisdiction has always been maintained" (p. 500), this Court held that a peace officer or a private citizen as such lacks authority, without the order or direction of a military officer, to arrest or detain a person charged with a crime triable only by court-martial (in that case desertion). And the court noted (pp. 500-501) that the then existing removal statute (R. S. 1014), like the present Federal Rules of Criminal Procedure, had no application to courts-martial.

Congress followed the principle that courts-martial are distinct from the civil courts of the United States when it first authorized, in the 1863 statute we have discussed (*supra*, pp. 17-20), continuing court-martial jurisdiction over offenses committed in the military service. Section 2 of that Act (12 Stat. 696, 697) provided:

> * * * any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Thus, for ninety years, there has been a continuing pattern of direct action by the military to enforce court-martial jurisdiction over discharged personnel.

Similarly, the Selective Draft Act of 1917, 40 Stat. 76, and regulations thereunder declared that persons who failed to report for induction were automatically "in the military service" and thereafter subject to court-martial jurisdiction. Under this authority, a number of persons evading the draft were apprehended by the military authorities and brought to trial by courts-martial for desertion. The validity of such action was consistently upheld. *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C.A. 2), certiorari denied, 310 U.S. 638; *United States* v. *McIntyre*, 4 F. 2d 823 (C.A. 9); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C.A. 2), certiorari denied, 262 U.S. 760; *Franke* v. *Murray*, 248 Fed. 865 (C.A. 8); see *Billings* v. *Truesdell*, 321 U.S. 542, 546-547. It can scarcely make a constitutional difference that persons apprehended and tried under the 1917 Act, though they had never worn the uniform, had been declared to be "in the military service" whereas Toth, though his alleged crime was committed "in the military service," has been discharged. The critical point in both instances is that Congress had validly conferred military jurisdiction and that it was equally valid to authorize the exercise of such jurisdiction by the military authorities.

That the determination of whether there is probable cause for the apprehension of a person subject

to court-martial jurisdiction, who is not actually in the military service at the time, is left in the first instance to the military authorities, without specific provision for judicial review, does not establish a lack of due process. Pertinent here is the observation of the court in *In re Bogart*, 3 Fed. Cas. 796, 801, the first case to consider the question of continuing court-martial jurisdiction over discharged servicemen under the Act of 1863:

> This court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositories of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them.

As we have shown (*supra*, pp. 46-47), the procedure for determining probable cause in a case of this type is substantially as careful and fair as that employed by the civil authorities. The fact that the officers who employ it are in the military service—subject, of course, to the direction of the civilian Secretary whose specific consent is required for action under Article 3(a), *supra*, p. 46—is no basis for concluding that it fails to afford due process.

In short, the fact that Toth was apprehended by the military authorities and brought for trial to Korea, the place of the alleged offense, "for the proper administration of military justice" (R. 93),

in no way offends against due process. As the court below observed, it is a familiar concept of law that a man should be "answerable for a crime as of the time, place and circumstance of its commission, rather than the time, place and circumstance of his apprehension" (R. 40). A trial by court-martial is a trial under the authority of the United States. For an American trial, a preliminary hearing before the defendant is brought to the court having jurisdiction is not a matter of constitutional right. *Hughes* v. *Gault*, 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400. As Mr. Justice Holmes said for the Court in the *Gault* case (at 149):

> The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime.

Even in cases of extradition from one state to another, there is no constitutional requirement that the governor of the asylum state grant a hearing to the accused before honoring a demand for extradition. *Marbles* v. *Creecy*, 215 U.S. 63, 68.

Of course, habeas corpus is available in appropriate circumstances to test the validity of extradition or removal.[19] And here we reach the heart of the answer to petitioner's claim that due process is inevitably violated because the military authorities have undertaken to remove Toth to Korea, the place of the crime, to stand trial. As the court below points out (R. 46), and as the events of this case demonstrate, "the federal courts were open to Toth, upon petition for a writ of *habeas corpus* at every instant after his apprehension"—insuring his right to due process and safeguarding against action by the military authorities in excess of their jurisdiction.

Habeas corpus is the traditional method of determining whether a person is rightfully held by the armed forces as one subject to military jurisdiction. *Billings* v. *Truesdell*, 321 U.S. 542; *Ex parte Quirin*, 317 U.S. 1; *Application of Yamashita*, 327 U.S. 1; *Eagles* v. *Samuels*, 329 U.S. 304. While, normally, review of court-martial jurisdiction is deferred until all remedies within the military system have been exhausted (*Gusik* v. *Schilder*, 340 U.S. 128), the courts can, as they have in this case, consider the transfer from civilian to military jurisdiction a sufficiently special circumstance to justify issuance of the writ before trial, to test the right of the military to take custody of a discharged

[19] On extradition, see *United States ex rel. Darcy* v. *Superintendent of County Prisons*, 111 F. 2d 409 (C.A. 3), certiorari denied, 311 U.S. 662. Removal cases are discussed in note 22, p. 54, *infra*.

serviceman in civilian status at the time of his apprehension. Cf. *Sanal* v. *Large*, 332 U.S. 174, 179-180. Thus, in *Billings* v. *Truesdell*, 321 U.S. 542, habeas corpus was the means by which a person held for trial by court-martial obtained his release on the ground that he was not subject to military jurisdiction. And see *Ex parte Qui* . . ., *supra*.[20]

In the civil courts of the federal system, a warrant of removal to a distant place is issued "upon the production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." Rule 40(b)(3), F. R. Crim. P. Toth's removal upon sworn charges, following scrutiny by the Secretary of the Air Force, is

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[20] The Government conceded jurisdiction in this case (R. 21) although Toth had been transferred to Korea when the writ was sought. There is no question that Toth could have sought habeas corpus when he was apprehended in Pittsburgh or at any time until he was flown to Korea. The case is thus different from one where a person has never had a cause of action which was clearly within the jurisdiction of a district court of the United States, as, for example, an American citizen apprehended outside the territorial or maritime jurisdiction of the United States by authority of the United States. The question of jurisdiction presented by the latter situation has not been decided by this Court although there is an intimation in *Johnson* v. *Eisentrager*, 339 U.S. 763, 790, that an American citizen in such a position ought to have "standing to invoke the process of federal courts somewhere." The situation presented here is substantially like that in *Burns* v. *Wilson*, 346 U.S. 137, where the petitioners were convicted by court-martial in Guam, within the jurisdiction of a federal district court, and subsequently, after transfer to Japan for convenience of the Government, commenced habeas corpus proceedings in the United States District Court for the District of Columbia. The Government did not contest jurisdiction and this Court considered and decided the issues presented by the petition.

by no means a strikingly dissimilar procedure.[21] Safeguarded ultimately by the availability of habeas corpus, the procedure thus meets fully the standards of fairness prescribed by due process. And there is no need to consider now the entire scope of the issues which might be open on a petition for habeas corpus brought to test the exercise of military jurisdiction under Article 3(a).[22] (Cf. note 21, *supra*.) It is enough for present purposes that the remedy is available and that petitioner, who has employed it, raises no specific claim that Toth has been treated unfairly, but only assails the root and branch of military jurisdiction as presenting, by its very existence, a violation of the Constitution. It is sufficient answer to reiterate that Congress had power to create such jurisdiction, that the procedures for its exercise are fair

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[21] There is no problem of identity in this case. It may be assumed, however, that such an issue would be among those open in the habeas corpus court, being simply one form of the question whether the civilian apprehended was subject to military jurisdiction. Cf. *Billings* v. *Truesdell*, *supra*.

[22] Reverting to the analogy of removal proceedings in the civil courts (see *Sunal* v. *Large*, 332 U.S. 174, 179, n. 13), it has been held there that habeas corpus is available to determine whether the court to which the defendant is to be removed has jurisdiction over the offense (*Salinger* v. *Loisel*, 265 U.S. 224), although jurisdiction will not be decided if the issue involves complex facts or seriously controverted questions of law (*Rodman* v. *Pothier*, 264 U.S. 399). The courts have also examined the question of whether removal violates a constitutional right (*Haas* v. *Henkel*, 216 U.S. 462) and whether there is an entire lack of evidence to support the charge (*Tinsley* v. *Treat*, 205 U.S. 20; but cf. *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 401).

ones, and that the civil courts are open to enforce the Constitution's guarantee of due process.

We add a word, finally, regarding the dire consequences petitioner foresees from affirmance of the decision below. The forebodings are unwarranted. The subject of civilian supremacy over the military is one on which the Congress has been uniformly alert. We have sufficiently emphasized that, as the bare language of Article 3(a) makes clear, it applies to the extremely narrow area of crimes over which the civil courts lack jurisdiction. The provision has been ringed around by careful administrative safeguards against irresponsible employment even in the exceptional cases it covers. It leaves intact the statute of limitations and the other procedural guarantees with which Congress was mainly concerned when it enacted the new Uniform Code. In nearly four years of operation, it has been involved on a total of two occasions—in this and one other case where the accused tested by habeas corpus the propriety of the assertion of jurisdiction over him.[23]

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[23] *Rubenstein* v. *Wilson*, 212 F. 2d 631 (C.A. D.C.). Though the only issue considered in the opinion was whether Rubenstein had been, at the time of the offense ("the relevant period," p. 632), a person "accompanying" the armed forces within Article 2(11) of the Uniform Code, it was undisputed that this status had ended before his apprehension. Thus, when the issue of accompaniment was finally resolved against him (*Matter of Rubenstein*, D.D.C., August 27, 1954, No. 104-53), jurisdiction rested on Article 3(a) and had ac-

Judged by the actual facts of the problem, the picture petitioner paints of secret arrests, of unbridled military power, and of millions of veterans set adrift on seas of insecurity does not square with any discernible realities. It may not be amiss to recall again that the "basic guarantees" of due process "have long been recognized and honored by the military courts as well as the civil courts." *Burns* v. *Wilson*, 346 U.S. 137, 142-143. Military requirements are at their best unpleasant—for the soldier sent to Korea to fight as well as the recently discharged airman sent there to stand trial by an American court-martial for a murder he is alleged to have committed while he served there. The problems are not solved in either case by judging the powers of Congress against a presumption that the military jurisdiction it confers will be exercised without regard to individual rights.

In simple and literally apt terms that reflect Everyman's deepest "sense of injustice,"[24] Congress has judged that members of the armed forces must not be permitted to "get away with murder."

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cordingly been exercised only upon consent of the Secretary of the Air Force.

Court-martial jurisdiction over discharged servicemen under the 1863 statute (*supra*, p. 17) was similarly exercised very infrequently. See *Winthrop*, *op. cit. supra*, pp. 92, 710. From 1917 to the effective date of the Uniform Code in 1951, the Army and Air Force had a total of nine cases of this type, including four referred to earlier which were heard in habeas corpus proceedings (*Joly*, *Terry*, *Marino*, and *Kronberg*, cited *supra*, p. 18).

[24] Cf. Cahn, *The Sense of Injustice* (N.Y.U. Press, 1949).

The judgment is a sound one. The Constitution plainly permits the means by which it has been implemented.[25]

[25] We note the suggestion (Pet. Br. 21) that Congress could have authorized trial of crimes like the one in this case by the civil courts, for which petitioner cites Myers and Kaplan, *Crime without Punishment*, 33 Geo. L. J. 303, 327 (1947). Actually, however, those authors on the preceding page also suggest the alternative Congress ultimately chose, concluding that it "would not controvert any doctrine enunicated by our Constitution." The wisdom of the choice may be arguable; as we have noted (*supra*, p. 23), the Judge Advocate General of the Army stated vigorously his preference for assigning the problem to the civilian courts. But if we are correct in our view that the decision Congress made, after weighing the alternatives, is constitutional, there is no occasion here to reevaluate the choice. See pp. 23-24, 28-30, *supra*. It is sufficient to add that there is much to be said for conferring jurisdiction on the military courts where (1) the offenses are by military personnel subject to military law, (2) discovery and investigation are accomplished by military personnel, and (3) the place of the offense and the witnesses is likely to be somewhere overseas—all of which is true in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

MARVIN E. FRANKEL,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

CHESTER W. WILSON,
Lieutenant Colonel, USAF,
Office of the Judge Advocate General,
United States Air Force.

JANUARY 1955.

APPENDIX

1. The pertinent provisions of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, sec. 1, 64 Stat. 107, are as follows:

Article 3 (50 U.S.C. 553).

Jurisdiction to try certain personnel.

(a) Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

Article 5 (50 U.S.C. 555).

Territorial applicability of the code.

This code shall be applicable in all places.

Article 7 (50 U.S.C. 561).

Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief

that an offense has been committed and that the person apprehended committed it.

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Article 9 (50 U.S.C. 563).

Imposition of restraint.

(a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

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(c) An officer, a warrant officer, or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

Article 32 (50 U.S.C. 603).

Investigation.

(a) No charge or specification shall be referred to a general court-martial for trial un-

til a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at such investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

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Article 34 (50 U.S.C. 605).

Advice of staff judge advocate and reference for trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

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2. The Manual for Courts-Martial, United States, 1951 (promulgated by Executive Order No. 10214, dated February 8, 1951, 16 F.R. 1303-1469), provides in pertinent part:

Paragraph 11. *Termination of Jurisdiction.*—a. General Rule.—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such status.

b. Exceptions.—To this general rule there

are, however, some exceptions which include the following:

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia is not terminated by discharge or other termination of such status (Art. 3a). Jurisdiction under Article 3a should not be exercised without the consent of the Secretary of the Department concerned.

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Paragraph 19, *Apprehension.*—a. Who may apprehend.—All officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7b.

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c. Procedural steps to apprehend.—An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. The order of apprehension may be either oral or written.

d. Securing custody of alleged offender.—There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified, the limitations (21*a*; Art. 9) on the power to arrest or confine notwithstanding.

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Paragraph 21. *Arrest and Confinement.*—

a. Who may arrest or confine.—Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Officer, warrant officer, or civilian.*—Only a commanding officer to whose authority the individual is subject may order an officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer (Art. 9*c*). The authority to order such persons into arrest or confinement may not be delegated (Art. 9*c*).

For this particular purpose, the term "commanding officer" shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial.

3. Rule 40 [F. R. Crim. P.]. Commitment to Another District; Removal.

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(b) Arrest in Distant District

(1) Appearance before Commissioner or Judge. If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) Statement by Commissioner or Judge. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a

waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prose-

cution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

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